BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KETH NELSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 264,241
HARSHMAN CONSTRUCTION	)	
Respondent	)	
AND	)	
	)	
BITUMINOUS CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the November 8, 2001, preliminary hearing Order of Administrative Law Judge Jon L. Frobish. Claimant was denied benefits after the Administrative Law Judge found claimant had failed to prove accidental injury arising out of and in the course of his employment and timely notice. Those are the only issues before the Board for its consideration at this time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked as a heavy equipment operator for respondent for several years. Claimant's most recent job involved driving a machine called a scraper. This large, four-wheel-drive machine had a bottom section that lowered down to scrape dirt or sand from the ground in order to clear the rock underneath. Respondent's primary business involved rock crushing. Claimant testified that driving the scraper caused vibrations and bouncing which hurt his back.

Claimant's history is significant in that he had suffered a back injury in 1992 while working for a different company, which required he be off work for a period of time. Claimant settled that claim in 1994 for $17,000.

Claimant also had a prior accident while working for respondent in 1996. While driving a loader, he experienced back pain. The pain became so significant claimant could not get out of the loader without assistance and was taken to a hospital by ambulance. Claimant missed approximately two weeks of work and was treated by a chiropractor and

with acupuncture. Claimant returned to work without restrictions. Claimant did receive chiropractic and acupuncture treatment after 1996, but it was sporadic.

On September 19, 2000, claimant, his supervisor (Carl Struder, respondent's dirt stripping superintendent) and a coworker drove in a company pickup to Wichita. Claimant testified he told Mr. Struder, at that time, that his back was hurting. Mr. Struder testified for respondent and denied that claimant discussed any back pain on September 19, 2000. The next day, September 20, 2000, claimant went to his family doctor, Rachael Barr, M.D., with back complaints. Dr. Barr provided a note to respondent, advising that claimant was excused from work until he was reevaluated on September 27, 2000. There is no mention in any of Dr. Barr's medical records of a work-related connection to claimant's ongoing back complaints. September 19, 2000, was the last time claimant worked for respondent.

Dr. Barr continued providing claimant conservative care until approximately January 2001, when claimant was referred to an orthopedic surgeon, ultimately coming under the care of orthopedic surgeon Kris Lewonowski, M.D. Claimant was diagnosed with degenerative disc disease at levels L3 through S1, with radiculopathy into the left leg. Dr. Lewonowski performed a fusion with FRA spacers and buttress plates from L3 through S1, an L3 to the sacrum instrumented posterolateral iliac crest bone graft, and decompressive laminectomies at L4 and L5. As a result of these surgeries, claimant is unable to return to work in construction or operate heavy equipment.

The Administrative Law Judge found claimant had failed to prove accidental injury arising out of and in the course of his employment. For preliminary hearing purposes, the Board must agree. There is no medical evidence in the record to show a connection between claimant's ongoing back problems and his work with respondent. None of the doctors who examined or treated claimant, including Dr. Barr and Dr. Lewonowski, state that claimant's symptoms were caused or even aggravated by claimant's driving heavy equipment.

With claimant's history of back problems dating several years prior to his employment with respondent, the Board finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent on or about September 19, 2000.

Additionally, the Board finds that claimant failed to prove timely notice of accident. Claimant testified that he talked to Mr. Struder about back pain, but acknowledged that he never advised Mr. Struder that his back pain was related to his employment with respondent. None of respondent's representatives, including Mr. Struder; Warren Harshman, one of the owners of the company; and Diane Griffin, the office manager; were ever advised by claimant that he was claiming a workers' compensation injury on September 19, 2000. Claimant acknowledged he did not tell anyone from respondent of a work-related connection to his symptoms. The first time respondent's representatives

were made aware that claimant was alleging a workers' compensation claim was on March 2, 2001, when claimant called Ms. Griffin and told her that he was going to file a workers' compensation claim. However, the claim was going to be against the State of Kansas, claimant's employer at the time he suffered the injury in 1992. The first time respondent was made aware of a workers' compensation claim against respondent was the March 6, 2001, letter from claimant's attorney.

K.S.A. 44-520 requires that notice of accident be provided to respondent within ten days of the accident, stating the time, place and particulars of the accident. Claimant acknowledged he failed to advise respondent of a work-related connection with his back symptoms. K.S.A. 44-520 does allow the notice period to be expanded to 75 days if claimant's failure to notify under this section was due to just cause. However, claimant's first proven notice to respondent of an alleged accidental injury, the March 6, 2001, letter, exceeded the 75-day limit set in K.S.A. 44-520 and, therefore, the just cause provision of the statute would not apply to this case. The Board, therefore, finds claimant failed to provide notice to respondent in a timely fashion of his alleged accidental injury.

The Appeals Board, therefore, finds that the Order of the Administrative Law Judge should be affirmed, as claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employer and has failed to prove that he provided timely notice of accident to respondent as required by statute.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated November 8, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

c: Robert L. Feldt, Attorney for Claimant
Richard A. Boeckman, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director